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No. 77-1423

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALFRED PAVONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 570 F. 2d 674.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1978. A petition for rehearing with suggestion for rehearing *en banc* was denied on March 13, 1978. The petition for a writ of certiorari was filed on April 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon asserting the defense of unlawful electronic surveillance in a civil contempt proceeding, a recalcitrant grand jury witness is entitled to a plenary

hearing on the legality of the court-authorized interceptions and full discovery of all materials relating to the authorization and execution of the surveillance.

STATEMENT

On October 20, 1977, petitioner was summoned before a federal grand jury in the Northern District of Illinois. He asserted his Fifth Amendment privilege against compulsory self-incrimination and refused to answer the questions propounded to him (Pet. App. 2a). He was then granted immunity under 18 U.S.C. 6002 and 6003. After being resummoned before the grand jury, he again refused to testify, reasserting the privilege against compulsory self-incrimination and claiming that the grand jury's inquiries were based upon illegal electronic surveillance (Pet. App. 3a). The government then filed a petition with the district court asking that petitioner be found in civil contempt.

At a hearing on the contempt petition, the government disclosed that the questions propounded to petitioner by the grand jury were derived from a wire interception of his conversations. The interception, the government noted, was authorized by a court order entered pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520 (Pet. App. 3a). Petitioner alleged, as a defense to the contempt charge, that the court-authorized interception was unlawful because the statutory requirements of Title III had not been satisfied (R. 2). He requested full discovery of all materials relevant to the authorization and execution of the interceptions, he moved to suppress the intercepted conversations, and he requested a full evidentiary hearing on his motion (R. 2, 3, 9). In his discovery request, petitioner demanded an opportunity to hear all the original tape recordings of the intercepted conversations

and to inspect the transcripts of the conversations along with any logs or reports quoting or summarizing the conversations, copies of periodic reports by agents, copies of the affidavits and applications for court authorizations, and copies of the court orders authorizing the interceptions (Pet. App. 3a).

The district court found that petitioner's allegations of illegality were merely conjectural. Nonetheless, the court undertook an *in camera* inspection of the materials relating to the wire interception (Pet. App. 3a). Following that review, the court ruled that the wire interception authorizations and the supporting applications and affidavits were consistent with the statutory requirements. The court also found that the interceptions had been carried out in conformity with the court orders and that the questions asked of petitioner in the course of the grand jury proceedings derived from wiretaps that had been legally authorized. The court therefore denied petitioner's motion to suppress, ruled that no further hearing was necessary, and adjudged petitioner in civil contempt (Pet. App. 3a-4a).

ARGUMENT

1. Petitioner contends that the district court erred in assessing the legality of the wire interception *in camera* rather than granting his discovery motion and conducting a full adversary suppression hearing.

Analysis of petitioner's argument must begin with this Court's decision in *Gelbard* v. *United States*, 408 U.S. 41. The Court there held that 18 U.S.C. 2515 gives a witness a right to refuse to answer questions before a grand jury if those questions are the product of an illegal interception of his conversations conducted without court authorization. In *Gelbard*, however, the Court left open the question whether the Section 2515 defense would be

available if the interception were conducted pursuant to court order. 408 U.S. at 61 n. 22. In his concurring opinion, Mr. Justice White specifically addressed that problem and suggested that a "different accommodation" may be appropriate when the Government "produces a court order for the interception * * * and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order." 408 U.S. at 70 (White, J., concurring).

Petitioner seeks to extend *Gelbard* to apply to contempt proceedings in cases which the government has conducted its interceptions pursuant to a court order. In this setting, he contends, 18 U.S.C. 2518(9) requires that he be furnished a copy of the order authorizing the interception, along with the application for the order, and 18 U.S.C. 2518(10)(a) entitles him to move to suppress the fruits of the allegedly unlawful interception, and to obtain through discovery all the materials that may be relevant to his claim of illegality.

The court of appeals correctly rejected this claim (Pet. App. 4a-8a). The protracted interruption of grand jury proceedings that would result from plenary suppression hearings in such circumstances would substantially impede the investigative functions of the grand jury. See *United States* v. *Calandra*, 414 U.S. 338, 349-350. Furthermore, as the court of appeals observed, evidentiary hearings and disclosure of the documents supporting wire interception orders would expose sensitive material, possibly jeopardizing other witnesses and informants as well as "educat[ing] the witness and any associates and suggest[ing] to receptive minds that testimony be tailored to only that which is believed to be already known to the grand jury" (Pet. App. 7a).

These considerations have led a majority of the courts that have considered the issue to conclude that where a recalcitrant witness raises the claim of an illegal wiretap in defense to a contempt charge and the government produces a court order authorizing the interception, the district court is required to conduct only an *in camera* examination to determine the order's facial validity. The leading decision on this point is *In re Persico*, 491 F. 2d 1156 (C.A. 2), certiorari denied, 419 U.S. 924, which has been widely followed, both in the Second Circuit and elsewhere. See *In re Gordon*, 534 F. 2d 197 (C.A. 9); *In re Millow*, 529 F. 2d 770 (C.A. 2); *In re Grand Jury Proceedings*, 522 F. 2d 196 (C.A. 5), certiorari denied *sub nom. Worozbyt* v. *United States*, 425 U.S. 911; *United States* v. *Grusse*, 515 F. 2d 157 (C.A. 2); *Droback* v. *United States*, 509 F. 2d 625 (C.A. 9), certiorari denied, 421 U.S. 964; *In re Vigorito*, 499 F. 2d 1351 (C.A. 2), certiorari denied, 419 U.S. 1056. This resolution fairly accommodates the contemnor's Section 2515 defense and the need to avoid undue disruption of the grand jury's proceedings and to protect sensitive investigative materials from premature disclosure. The procedure petitioner advocates here, under which authorized interceptions could be challenged in full-blown suppression hearings, would result in protracted interruption of grand jury proceedings without substantially furthering the policies underlying Section 2515. *Gelbard* v. *United States, supra*, 408 U.S. at 70 (White, J., concurring); *id.* at 75-77 (Rehnquist, J., dissenting).

Nor do the statutory provisions on which petitioner relies require a different result. Petitioner suggests (Pet. 9-10) that the district court's *in camera* review of the transcript of the grand jury proceedings constituted a "disclosure of the contents" of his intercepted communications sufficient to trigger the discovery rights

under Section 2518(9), and that he was an "aggrieved person" under Section 2518(10), entitling him to discover all of the materials relevant to the electronic interceptions at issue.

With respect to Section 2518(9), the court's *in camera* review of a grand jury transcript is the very opposite of a "disclosure" of the intercepted communications. The court reviewed the materials relating to the interceptions *in camera* precisely because it deemed disclosure inappropriate. It would be unreasonable to construe *in camera* review as a "disclosure" within the meaning of Section 2518(9) so as to require production of the very materials the court deems too sensitive to disclose. Such a construction would make it impossible for a court ever to review wiretap materials *in camera* without providing disclosure to the target.

With respect to petitioner's claim for discovery under Section 2518(10)(a), that Section provides that discovery will be subject to the district court's discretion. Even if a contempt proceeding under 28 U.S.C. 1826(a) is a "proceeding" within the meaning of Section 2518(10)(a),[1] discovery may properly be limited according to the scope of the inquiry in the contempt proceeding. Since in this case an *in camera* review of the relevant materials was sufficient to dispose of petitioner's claims, it was unneccessary—and indeed would have been inappropriate—for the court to grant petitioner discovery rights to the sensitive wiretap materials.

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[1]We doubt that a contempt proceeding is a "trial, hearing, or proceeding" of the kind referred to in Section 2518(10)(a), since the contempt mechanism "is so intimately connected with the grand jury proceedings in which the testimony is desired as to be really a part of those proceedings." *In re Persico, supra*, 491 F. 2d at 1162; *In re Gordon*, 534 F. 2d 197, 199 (C.A. 9); see *Gelbard* v. *United States, supra*, 408 U.S. at 80-84 (Rehnquist, J., dissenting).

2. As petitioner correctly states, the courts of appeals differ in their view of the scope of the inquiry a district court should conduct when a recalcitrant grand jury witness raises a Section 2515 defense in a contempt proceeding. In the case of *In re Lochiatto*, 497 F. 2d 803, the First Circuit held that where the government does not object to disclosure on secrecy grounds, the witness should be allowed limited discovery of documents supporting the interception to assist him in asserting his Section 2515 defense.[2] Yet even under *Lochiatto*, the contemnor is not entitled to litigate issues such as the truth of an affiant's statement or the extent of the minimization of the interception by federal officials. *In re Lochiatto, supra*, 497 F. 2d at 808. Moreover, if an objection to disclosure on secrecy grounds is made by the government, an *in camera* examination by the court is all *Lochiatto* requires unless the secret material can be successfully excised from the disclosed documents. *Ibid.* Furthermore, when the putative contemnor's claim is that the authorization is invalid on its face—petitioner's primary claim in this case[3]—the *Lochiatto* court did not

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[2]Under the decision in *Lochiatto*, discovery would be limited to the authorization application of the Attorney General or his designate, the affidavits in support of the court order, the court order itself, and an affidavit submitted by the government indicating the length of time the surveillance was conducted. *In re Lochiatto, supra*, 497 F. 2d at 808.

[3]Petitioner asserted twelve reasons before the district court for his belief that his communications were unlawfully intercepted. Ten of these claims dealt with the facial validity of the authorization of the Attorney General, the application, and the order itself (R. 2). Petitioner's additional claim that the tapes of the interception were improperly sealed was correctly rejected by the court below, which held that in view of the absence of the judge issuing the interception order, the "slight deviation from the literal wording of the statute" in having the sealing function performed by a substitute judge is "no

require an evidentiary hearing, noting that "facial viewing by the court [is] sufficient to demonstrate facial validity or invalidity." *Ibid.* See *In re Mintzer*, 511 F. 2d 471, 473 (C.A. 1); *In re Marcus*, 491 F. 2d 901 (C.A. 1). Accordingly, while the *Lochiatto* decision is in conflict with the decision below in its analysis, it is not clear that application of the principles of *Lochiatto* would have produced a different result in this case.

In addition to *Lochiatto*, petitioner relies on *Melickian* v. *United States*, 547 F. 2d 416 (C.A. 8), certiorari denied, 430 U.S. 986, and *In re Grand Jury Investigation* (*Maratea*), 444 F. 2d 499 (C. A. 3). These cases, however, are not in conflict with the decision here. The *Melickian* court indicated in dictum that it substantially approved the procedure set out in *Lochiatto*, but since the government in that case made a valid claim that the materials requested by the contemnor were sensitive, the court of appeals approved an *in camera* review of the kind conducted in this case. In those circumstances, the court ruled that the denial of Melickian's motion for discovery and for an evidentiary hearing was not an abuse of the district court's discretion.

The *Maratea* case is even less clearly on point. In *Maratea*, a pre-*Gelbard* decision, the court of appeals remanded the case to the district court for "a hearing on [the] contention that [the witness] is privileged not to testify because his testimony would constitute a disclosure by the government of the contents or fruits of illegal electronic surveillance directed against him." 444 F. 2d at

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basis for a finding that the electronic surveillance was illegal" (Pet. App. 8a). Petitioner's final claim—that his conversations were derived from other interceptions not authorized by court orders—was rejected by the district court, which found that the grand jury's questions originated from the authorized wire interception (Pet. App. 4a).

500. It is unclear from the language of the opinion whether the hearing contemplated was a full adversary hearing of the kind requested by petitioner with respect to the illegality of the wire interception. In any event, the *Maratea* court took no position with respect to the discovery rights, if any, of the recalcitrant witness in such a proceeding.

Although it may be necessary for this Court at some point to resolve the apparent conflict between the decision in *Lochiatto* and the decisions of the courts that have followed the Second Circuit's lead in *Persico*, at present it appears that the conflict may be more theoretical than real. In light of the approach taken by the court in *Melickian*, it may well be that a case will rarely, if ever, arise in which the principles of *Lochiatto* will require more than *in camera* examination of the wiretap authorization materials. Accordingly, we submit that, for now at least, the apparent conflict need not be resolved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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